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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 340

JULIUS HYMAN & COMPANY, a Corporation, ET AL.,
Petitioners,

v.

VELSICOL CORPORATION, *Respondent.*

On Petition for a Writ of Certiorari to the Supreme Court of Colorado.

PETITIONERS' REPLY TO BRIEF OF RESPONDENT IN OPPOSITION.

CLAUDE PEPPER,
723 Cafritz Building,
Washington 6, D. C.,
Attorney for Petitioners.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Counsel for respondent has seen fit in his brief in opposition to petition for certiorari to characterize petitioners' actions with such expressions as "piracy." "stealing," "conspiracy to destroy," "organized campaign of sabotage" and the like. If upon the good authority of judging a tree by its fruit one would judge respondent's *alter ego* Regenstein and petitioner Hyman in this case, it

need only be recalled that from the joint venture into which Regenstein and Hyman entered, Regenstein today has property admittedly worth several million dollars, a judgment against Hyman for some one and a half million dollars, with further sums to follow if the decree of the Supreme Court of Colorado should be affirmed, and an injunction which deprives Hyman of his business, its earnings and his own discovery, and that from the same venture, to which Hyman contributed fifteen years of his life, his genius and 40 discoveries, including two original discoveries upon which the venture was begun with which Regenstein had no previous connection, Hyman emerges with only one percent of the stock of respondent.

Respondent's brief makes two principal arguments. One misreads the record, the other misapplies a well-known principle of law.

ARGUMENT THAT NO FEDERAL QUESTION IS PRESENTED OR PROPERLY RAISED.

In arguing as he does that no federal question is presented here or was presented or decided in the courts below, counsel for respondent has chosen to ignore the persistent effort of the petitioners as defendants and appellants in the Courts below to raise and to secure decision upon the rights under the Constitution and laws of the United States here asserted.

From the inception of this case, petitioners as defendants in the trial court have been resisting respondent's effort as plaintiff to take away Hyman's invention, deny them the right to manufacture and sell in interstate commerce the subject of his invention and to forbid them to use the knowledge of which he was the admitted discoverer. It is their rights under the commerce clause of the Constitution, the Fourteenth Amendment and the Sherman Anti-trust Laws which respondent has sought to take away.

Petitioners have pleaded persistently that the trade secrets asserted as a basis of relief were not secrets but public information, as a result of foreign patent applica-

tions and other disclosures. When the Denver District Court denied petitioners the right to show this, then a federal question inevitably appeared. For petitioners' alleged restrictive agreements with respondent were valid and not repugnant to the Sherman Anti-trust Act only if the subject of the alleged instruments was a trade secret of respondent. Thus the Colorado Courts upheld and enforced a restraint of trade without the condition being shown which would have prevented such restraint of trade from being in violation of the Sherman Act.

As the effect of the two Colorado Courts' enforcement of this restraint upon the basis of estoppel rather than upon the proven existence of secrets became apparent as an unlawful restraint of trade, petitioners pointed this out to those Courts. The recognition of this changing situation and the appropriate steps taken by petitioners to present the issue created thereby are apparent from the record. In the first instance, in their Answer, petitioners asserted simply that there could be no relief or recovery because no trade secrets existed. (R. 1, fol. 290.) By motion for summary judgment, they attempted to obtain dismissal of the action on the same ground. (R. 1, fols. 381-410) During the trial by offer of evidence of the publication, excluded by the Court, they attempted to obtain a decision on the merits based on the non-existence of the secrets. By motion after the decree asking the dissolution of the injunction, petitioners gave the trial Court an opportunity to correct its error in refusing to give weight to the publication of the inventions and asserted the illegality of a restraint based on such a record, asserting:

> "(b) That the public disclosure and dedication and the fact that the alleged trade secrets of plaintiff are available to the public at large and have fallen into the public demesne makes it improper for this Honorable Court to restrain the defendants as provided by its injunctive decree heretofore entered. * * *

* * *

> "It is respectfully urged that a denial of this motion will result in a deprivation of property of defendants without due process of law in violation of the provisions of the Constitution of the United States of America." (R. 5, fols. 3575-6)

While the anti-trust laws are not mentioned the inference is clear. Thereafter by specification of error and by argument to the Colorado Supreme Court on appeal, the question was again raised, expressly and clearly. The first point urged by petitioners in their brief on appeal to the Colorado Supreme Court commences:

> "1. Plaintiff's only claim is predicated upon the existence of trade secrets with respect to which it avers proprietary rights. Absent such trade secrets, plaintiff has not been damaged and the injunction granted below results in an illegal restraint of trade in violation of public policy as announced by the anti-trust acts. * * * "

Twenty-five pages of petitioners' brief in that Court are then devoted to the argument of this point. Finally, in an attempt to give the Colorado Supreme Court a last opportunity to correct its error, petitioners presented the argument of the unlawfulness of this restraint of trade based on estoppel to share in the public domain as the sole ground of a petition for rehearing. (R. 6, p. 10)

Petitioners, therefore, have diligently asserted throughout this case and still assert a right, privilege and immunity which they claim under the Constitution and Statutes of the United States. These rights the District Court and the Supreme Court of Colorado denied over petitioners repeated protests without justification in law or fact.

To this Honorable Court petitioner finally comes to protect these rights.

ARGUMENT OF RES ADJUDICATA.

The argument of counsel for respondent asserting that the decision of the Illinois Supreme Court in *Velsicol Corporation* v. *Julius Hyman* and this Court's denial of certiorari are res adjudicata as respects this case exhibits that he has a short memory. In his "Reply of Plaintiff to Defendants' Supplement to Their Answer to the Supplement to the Complaint" filed September 29, 1949, in the District Court of Denver, Colorado, in this case, counsel for respondent said the following:

> "Plaintiff further avers that the issues and the parties in Velsicol Corporation, Plaintiff, vs. Julius Hyman, Defendant, pending in the courts of Illinois, are different from the issues and the parties in this case and that whatever judgment is finally entered in the Illinois suit *will not be* res adjudicata of the issues in this case, * * * " (italics ours) (R. 5, fol. 5736)

Counsel was right then and wrong now for "the issues and the parties in Velsicol Corporation, Plaintiff, vs. Julius Hyman, defendant, * * * (in the Illinois Supreme Court) *are* different from the issues and the parties in this case." The Illinois case was respondent's suit against one party for the assignment of an invention. This suit is its action against many parties for the alleged violation of a secrecy obligation relating to trade secrets.

The decisive answer to respondent's assertion is the decision of the Supreme Court of Colorado itself, which purported to decide this case exclusively upon the record made in the Colorado Courts and not upon the decision of the Illinois Court.

Obviously, if the decision of the Illinois Supreme Court in Velsicol Corporation vs. Julius Hyman was not res adjudicata with respect to the issues in the Colorado Supreme Court, the action of this Court upon the Petition for Certiorari to the Illinois Supreme Court can have no bearing here, much less make the issues herein res adjudicata.

CONCLUSION.

Petitioners have presented the injury they have sustained to their federal constitutional and statutory title, right, privilege and immunity and the injury to the public interest in violation of federal law which the decree of the highest court of Colorado effected. Petitioners, therefore, respectfully submit that they have made a case for review and redress by this Court.

Respectfully submitted,

CLAUDE PEPPER,
723 Cafritz Building,
Washington 6, D. C.,
Attorney for Petitioners.

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PETITION FOR REHEARING.

CLAUDE PEPPER,
723 Cafritz Building,
Washington, D. C.,
Attorney for Petitioners.

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